STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

COMPLAINT AND REQUEST FOR DISPUTE RESOLUTION OF ESSEX TELCOM, INC. AGAINST GALLATIN RIVER COMMUNICATION, L.L.C.	)))))	DOCKET NO. 01-0427

GALLATIN RIVER COMMUNICATIONS LLC'S REPLY BRIEF

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INTRODUCTION

Although Essex Telcom, Inc. ("Essex Telcom") brought its Complaint in this case based on its claims that calls to its Virtual NXX codes should be treated as local, Essex Telcom spends most of its Initial Post-Hearing Brief ("Initial Brief") arguing that completion of calls to its ISP affiliate should be controlled not by the NXX codes that it uses, but by the FCC's recent order in *In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996*, CC Docket No. 96-98, FCC 01-131 (rel. April 27, 2001) ("ISP Remand Order"). While this abrupt change of direction is confusing, it does not alter the outcome. The ISP Remand Order may have changed the way the FCC analyses the completion of ISP-bound traffic within a local exchange, but it did not supersede the existing rules controlling the origination or termination of interexchange calls, and the Commission should reject Essex Telcom's contrary interpretation of the ISP Remand Order.

Essex Telcom's only other argument as to why calls to its Virtual NXX numbers should be subject to bill and keep rather than carrier access is the argued resemblance of those calls to foreign exchange or FX traffic. (Consistent with its moving target approach, this issue was not raised by Essex Telcom until its rebuttal testimony.) No matter how it is cast, however, the net result of Essex Telcom's position on Virtual NXX codes is that it should be allowed to manipulate the basic rules of local and interexchange compensation -- not based on the nature of the interconnection it requires from Gallatin or based on any technical attribute of the service it provides to its customers -- but based either on the telephone numbers it uses. The Order that Essex Telcom seeks would allow any carrier to treat calling to or from any physical location as a "local" traffic and thus to manipulate the intercarrier compensation for that traffic simply by occupying full NXX codes or thousand-number blocks and pointing them for billing purposes to calling areas that are unrelated to the customer's physical location.

The Commission should reject this sleight of hand as inconsistent with of the Telecommunications Act of 1996 ("TA96"), as inconsistent with the terms of the Interconnection Agreement between the parties and as an abuse of numbering resources. Rather, the Commission should allow carriers to distinguish the jurisdiction of local and interexchange traffic on the basis of the physical location of the calling and called parties. The Commission should not create an incentive for carriers to arbitrage carrier access rates through the misuse and stranding of thousands of unused telephone numbers.

Similarly, Essex Telcom argues that the FCC's interconnection rules should allow it to avoid network build out and shift its cost onto Gallatin and other incumbent carriers simply because the incumbent carrier may be the most efficient provider of certain network facilities. Whether or not using Gallatin facilities is more efficient, Gallatin is entitled under the Interconnection Agreement to recover costs created by Essex Telcom's choice to limit its network build out.

ARGUMENT

I. VIRTUAL NXX INTEREXCHANGE TRAFFIC IS SUBJECT TO CARRIER ACCESS AND NOT ANY FORM OF RECIPROCAL COMPENSATION, INCLUDING "BILL AND KEEP"

Essex Telcom repeatedly characterizes the Virtual NXX issue in this case as a choice between reciprocal compensation on the one hand and bill and keep on the other. However, both reciprocal compensation and bill and keep are compensation schemes that apply to "local" or, perhaps more appropriately, "non-interexchange" traffic. In fact, TA96 defines bill and keep as a form of reciprocal compensation. *See* 47 U.S.C. § 252(d)(2)(B) (defining bill and keep as "the mutual recovery of costs through the offsetting of reciprocal compensation obligations [through] arrangements that waive mutual recovery").

The conclusion that reciprocal compensation does not apply to Virtual NXX traffic between customers in different local calling areas is not controversial. However, it does not negate Gallatin's position -- it supports it. The question here is not which form of local compensation applies, but whether (as Essex Telcom asserts) local compensation schemes apply at all. As Gallatin explained in its Initial Brief (at 6 and 19), TA96 and the FCC have clearly preserved the distinction between the compensation regimes for traffic within the exchange and interexchange traffic. Under TA96 and under the Interconnection Agreement at issue here, calls between customers who are physically located in two different local calling areas are interexchange calls for which the carrier responsible for the interexchange portion of the call (here, Essex Telcom) should compensate the carrier originating the call (here, Gallatin) through carrier access.

Although Essex Telcom claims that it is not seeking reciprocal compensation and that it has only ever sought a bill and keep arrangement, the Interconnection Agreement (Schedule 1 to Gallatin Ex. 1) never mentions the term "bill and keep." The only compensation methods it mentions are reciprocal compensation under the agreement and access charges under applicable tariffs. Essex Telcom attempts to divert the Commission's attention from Interconnection Agreement through reference to the FCC's ISP Remand Order.[1] However, the ISP Remand

[1] While Essex Telcom relies heavily on the ISP Remand Order, it admits (fns. 7 & 35) that it does not agree with the ISP Remand Order as a matter of law or policy, and contends that calls to ISPs can be both local and intrastate. Based on these reservations, while Essex Telcom claims this is not a case of an ISP demanding reciprocal compensation, it is quite likely that, if the ISP Remand Order is overturned or withdrawn, this will absolutely be a case of an ISP demanding reciprocal compensation on the premise that the call from the dial-in customer to the ISP's point of presence is a separate call. While any party is entitled to rely on the state of the law, the Commission should not reward this type of opportunism where a party takes diametrically opposite positions solely to advance its immediate self interest.

Order does not change the rules applicable to interexchange calling, whether or not the interexchange carrier terminates to an ISP.

a. The ISP Status of Essex Telcom's Affiliate Does Not Foreclose The Application Of Carrier Access Charges

Essex Telcom now features the position that calls directed to its affiliate, Internet Services of Northern Illinois a/k/a Essex Internet, are exempt from access charges, not based on its use of Virtual NXX codes, but based on the FCC's recent ISP Remand Order. In its ISP Remand Order, the FCC addressed the concern that CLECs were inappropriately arbitraging Section 251(b) reciprocal compensation through their position that ISP-bound traffic was local, not interstate. In order to curtail the abuse of reciprocal compensation, the FCC concluded that TA96 recognizes more than two categories of traffic. Instead of its historical analysis bifurcating traffic into local and interstate, the FCC identified reciprocal compensation as the general rule with statutorily mandated exceptions for "exchange access" and "information access." *See, e.g.*, ISP Remand Order at ¶ 44. In the estimation of Essex Telcom, this result means that *all* traffic ultimately terminating to an ISP is subject to bill and keep. The ISP Remand Order, however, does not support such a sweeping change to the compensation structure provided by TA96 or provided by the FCC's own prior rulings.

Significantly, the ISP Remand Order has nothing to do with the Virtual NXX codes that were the premise of Essex Telcom's Complaint. The interpretation of the ISP Remand Order that Essex Telcom advocates would apply to *all* ISP-bound traffic without regard to whether it was reached through Virtual NXX codes or appropriately homed NXX codes and without regard to whether the ISP was reached through a seven-digit number or a 10-digit number.

Setting the Virtual NXX issue aside, there are two fundamental problems with Essex Telcom's analysis, one procedural and one logical. If Essex Telcom truly believed that all

ISP-bound traffic was subject to the ISP Remand Order, it would have raised its Complaint with the FCC, since the ISP Remand Order forecloses state commission jurisdiction to address the issue covered by that Order. *See* ISP Order at ¶ 82. The logical problem with such a sweeping conclusion is that it is out of sync with TA96, with the FCC's prior decisions, and with the FCC's stated goals in the ISP Remand Order. To the contrary, TA96 and the FCC's prior orders have taken care to preserve state control over intrastate access and the ISP Remand Order repeatedly acknowledges that its goal is to end the inappropriate arbitrage of reciprocal compensation, by which CLECs providing terminating service to ISPs recover too much of their cost from the originating ILEC and not enough from the CLEC's own ISP customer. *E.g.*, ISP Remand Order at ¶ 67 ("requiring carriers [through bill and keep] to recover the costs of delivering traffic to ISP customers directly from those customers is likely to . . . substantially eliminate existing opportunities for regulatory arbitrage").

TA96 not only preserves the distinction between carrier access and reciprocal compensation (as explained in Gallatin's Initial Brief at 6 and 19), it preserves the ability of state commissions to establish intrastate access. Section 251(d)(3) explicitly directs the FCC to avoid any unnecessary conflict with state authority over intrastate access. Specifically, Section 251(d)(3) directs that "the Commission shall not preclude the enforcement of any regulation, order or policy of a State Commission that --

> (A) establishes access and interconnection obligations of local exchange carriers;
> (B) is consistent with the requirements of this section; and
> (C) does not substantially prevent implementation of the requirements of this section and the purpose of this part.

Applying carrier access to a call that originates in one local calling area and is completed into another meets all of these requirements. It would be contrary to the express requirements of

TA96 for the FCC simply to preempt this Commission's intrastate access authority without an express purpose and an explicitly reasoned basis.

It would also be contrary to the FCC's prior rulings to simply brush aside the states' intrastate authority without comment. In fact, in the Order asserting its jurisdiction over reciprocal compensation disputes involving ISPs (in which CLECs and ISPs insisted that the call from the LEC to the ISP point of presence should be treated as a separate call), the FCC explicitly declined to override the states' intrastate authority and the states' discretion to determine appropriate compensation, despite its finding that ISP-bound calls were jurisdictionally interstate. *See In the Matter of Implementation of the Local Competition Provisions in the Telecommunications Act of 1996, Inter-Carrier Compensation for ISP-Bound Traffic*, FCC 99-38 (rel. Feb. 26, 1999) ("*Inter-Carrier Compensation for ISP-Bound Traffic*"). Viewing the *extent* of its jurisdictional authority as a separate issue from its determination as to *how much* of that authority to exercise, the FCC determined that it had jurisdiction over that traffic, but concluded:

> By the same token, in the absence of governing federal law, state commissions *are free* not to require the payment of reciprocal compensation for this traffic and *to adopt another compensation mechanism*. (*Id*. at ¶26; emphasis added).

Thus, the FCC has demonstrated its determination not to exercise its potential jurisdiction to preempt state access regulation just because it has the potential jurisdiction to do so.

Given the care with which the FCC has preserved state carrier access charge jurisdiction, it is evident that the ISP Remand Order was not intended to eliminate the existing rules regarding intercarrier compensation for interexchange traffic. Rather, the ISP Remand Order targeted the same, narrower category of traffic that was the subject of its earlier *Inter-Carrier Compensation* Order, traffic that would otherwise be subject to reciprocal compensation because the ISP was served by a CLEC in the same exchange as the originating caller. Not only is the more limited scope of the ISP Remand Order evident from its predecessor orders, but it is referenced, for example, in Paragraph 13 of the Order, where the FCC discusses the basis of its Order:

> 13. As a result of this determination ["that section 251(b)(5) reciprocal compensation obligations 'apply only to traffic that originates and terminates within a local area' as defined by state commissions"], the question arose whether reciprocal compensation obligations apply to the delivery of calls from one LEC's end-user customer to an ISP in the same local calling area that is served by a competing LEC. The Commission determined at that time that resolution of this question turned on whether ISP-bound traffic "originates and terminates within a local area," as set forth in our rule.

Order at ¶ 13 (footnotes omitted; emphasis added; bracketed material quoted from ¶ 12). The Order simply does not address compensation where an ISP is located in an exchange outside of the local calling area of the calling party.

Consistent with this more limited holding, the FCC explained that the ISP Remand Order responds to the problems created by its earlier suggestion that reciprocal compensation turns on whether a call is "local or interstate." ISP Remand Order at ¶ 45. Recognizing that the term "local" is undefined in TA96, the FCC adjusted its analysis to rely more directly on Section 251(g) of TA96 as providing the statutory exceptions to the reciprocal compensation requirements of Section 251(b). Section 251(g) exempts from reciprocal compensation calls that are subject to exchange access, information access and exchange services for such access to interexchange carriers and information service providers. *See* ISP Remand Order at ¶¶ 44-45. The FCC concluded that ISP-bound traffic constituted information access and therefore fell into *at least* one of the categories of Section 251(g). As a result, the FCC concluded only that ISP-bound traffic was not subject to standard state commission-established reciprocal compensation under Section 251(b).

What the FCC did *not* explicitly discuss was how to handle traffic that fell into more than one of the Section 251(g) categories, *i.e.*, interexchange traffic bound for an ISP that was both exchange access and, ultimately, information access. Essex Telcom's claim (Initial Brief at 9) that the "information access" character of such traffic trumps all other categories is no more than Essex Telcom's argument, unsupported by any specific citation to the ISP Remand Order.

If, contrary to Essex Telcom's position, such traffic is treated first and foremost as exchange access between the originating carrier and the carrier responsible for the interexchange piece, then appropriate compensation for intrastate interexchange calling is not impacted by the FCC's preemption analysis and the balance between state and federal jurisdiction is not changed. By comparison, if, as Essex Telcom argues, such traffic is treated first as information access, questions concerning appropriate compensation for that traffic are preempted from state commission consideration by Paragraph 82 of the ISP Remand Order and far more substantial changes to intercarrier compensation may follow.

Essex Telcom argues that the FCC's mere identification of its jurisdictional authority reflects the FCC's intent to exercise that authority, citing Paragraph 39 of the ISP Remand Order, where the FCC asserts that all services falling within Section 251(g) of the Act are subject federal jurisdiction under Section 201. Essex Telcom Initial Brief at 7, 9. Not only has the FCC already recognized its authority over ISP-bound traffic without preempting the states' ability to maintain intrastate carrier access authority, Paragraph 39 of the ISP Remand Order explicitly observes that states maintain their authority over intrastate services.

> These services [enumerated under section 251(g)] thus remain subject to Commission jurisdiction under section 201 (or, to the extent they are intrastate services, they remain subject to the jurisdiction of the state commissions). . . .

Really, the only new jurisdictional element in the ISP Remand Order is the *basis* for the Commission's assertion of jurisdiction over otherwise local ISP-bound traffic, not as to whether it has jurisdiction. The only change in substance in the FCC's treatment of such ISP-bound traffic was its withdrawal of such otherwise local traffic from state commission jurisdiction to determine the appropriate level of reciprocal compensation and its application of a single, specific local pricing formula -- bill and keep. Thus, consistent with its prior rulings, the ISP Remand Order stands for the more limited proposition that the FCC retains authority over a subset of traffic that, *but for* its character as information access, might otherwise be treated as local and subject to state commission-established reciprocal compensation rates, and that the FCC is imposing a single pricing mechanism to control that traffic.

Contrary to Essex Telcom's more-sweeping position, the ISP Remand Order repeatedly implies that is dealing only with traffic that would otherwise be subject to state commission-established reciprocal compensation, *i.e.*, traffic that is not interexchange. For example, the FCC ties the reciprocal compensation rates which a LEC may charge for voice traffic to the rates at which ISP traffic is compensated. ISP Remand Order at ¶ 90. It is clear from this example alone that the FCC views bill and keep as a type of reciprocal compensation and that -- contrary to Essex Telcom's claim (Initial Brief at 13) that the FCC has rejected the two-call scenario for ISP-bound traffic[2] -- it views the termination of traffic to an ISP within a given exchange as equivalent to the termination of voice traffic within that exchange.

Also by way of example, the ISP Remand Order characterizes its outcome as affecting compensation between *local* exchange carriers. *E.g.*, ISP Remand Order at ¶ 8 ("we adopt a

[2] The FCC has rejected the two-call scenario as a basis to block its jurisdiction over what would otherwise indisputably be local calling outside of the FCC's jurisdiction. However, its *ability* to assert jurisdiction over such calls is separate matter from its actual *exercise* of jurisdiction. While the FCC has long recognized its jurisdiction over calls to certain types of information service providers (*see* ISP Remand Order at ¶ 57 & n.111), it has

rebuttable presumption that traffic exchanged *between LEC*s that exceeds a 3:1 ratio of terminating to originating traffic is ISP-bound traffic subject to the compensation mechanism set forth in this Order"; emphasis added); *see id*. at ¶ 68 (noting that reciprocal compensation is used to govern "the exchange of ISP-bound traffic *between local* carriers"; emphasis added). Essex Telcom is carrying the traffic at issue here between exchanges, and thus is acting as an interexchange carrier, not a LEC. Moreover, the rule that Essex Telcom ascribes to the ISP Remand Order would be indistinguishable even for a traditional interexchange carrier.

As the foregoing examples illustrate, the primary purpose of the ISP Remand Order is to address the problems caused by CLECs arbitraging intercarrier access through state commission-established reciprocal compensation which applied under prior FCC orders only to "local" traffic. Nowhere in the ISP Remand Order does the FCC suggest that there has been -- or that the FCC intended to address -- any issue about the appropriate compensation for interexchange calling involving ISP-bound traffic. Yet, Essex Telcom argues that the FCC has changed not only the prevailing reciprocal compensation regime, but that, without so much as a passing comment, it has also changed a fundamental element of TA96's access charge regime and the balance between the FCC and state commission authority over intrastate access. That leap of logic advances no stated purposes of the ISP Remand Order.

That leap of logic also creates a dangerous loophole in the access charge regime, and unnecessarily limits state authority over intrastate interexchange traffic. It creates a dangerous loophole in the access charge regime because it would mean that any IXC could avoid access charges for traffic ultimately bound to an ISP, without regard to a dialing pattern. Significantly, the FCC's ISP Remand Order did not mention, let alone deal with, Virtual NXX or FX-like

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nonetheless, prior to its Remand Order, allowed the states to determine what compensation applied to termination of calls to an ISP originated within the same local calling area.

service issues. Nonetheless, Essex Telcom's position, if accepted, could lead to interexchange carriers refusing to pay access charges even on 10-digit "toll" calls. It seems very unlikely that the FCC intended to institute such a far-reaching change without comment.

It would unnecessarily limit state authority because the ISP Remand Order preempts further state decisions regarding the issues covered by that Order. ISP Remand Order at ¶ 82. If all ISP-bound traffic is to be treated first as information access and outside state authority, state utility commissions will lose authority over intrastate traffic ultimately terminated as information access. That result is excessive and unnecessary to the issues addressed in the ISP Remand Order. Again, it seems very unlikely that the FCC intended to institute such a far-reaching change without comment. Moreover, if Essex Telcom truly believed that the termination of its ISP-bound traffic was immune from intrastate carrier access charges, its Complaint should have been directed to the FCC.

Essex Telcom relies on a recent order of the Texas PUC, interpreting the ISP Remand Order. *See Consolidated Complaints And Requests For Post-Interconnection Dispute Resolution Regarding Inter-Carrier Compensation For "FX-Type" Traffic Against Southwestern Bell Telephone Company*, Docket 24015 (Rel. Nov. 28, 2001) ("Texas FX Arbitration"). While much of that arbitration Award is based on the arbitrators' consideration of prior Texas PUC rulings and therefore is simply inapplicable to the interconnection rulings of the Illinois Commission, Gallatin respectfully disagrees with the arbitrators' interpretation of the ISP Remand Order. Essex Telcom points to that decision because the Texas arbitrators apparently decided that the "information access" character of any traffic does trump the "exchange access" character of such traffic. Without regard to whether the arbitrators' decision would be preempted by the FCC even if it were correct, their conclusion is not dictated by the ISP Remand Order and is contrary to the overall logic of the ISP Remand Order.

Rather than repeat and compound the error of the Texas arbitrators, the Illinois Commerce Commission should reach a conclusion that is consistent with the ISP Remand Order while maintaining good policy and good sense, by determining that a call that is both interexchange and ISP-bound should be treated as exchange access between the originating carrier and the interexchange carrier, in this case, Gallatin and Essex Telcom, respectively. Stated another way, it should conclude that the ISP Remand Order does not impact traffic that is already excluded from Section 251(b) as being subject to carrier access charges.

Moreover, this entire discussion is outside the issue that Essex Telcom brought before this Commission, *i.e.*, whether it should be able to manipulate the jurisdictional nature of calls to its customers through the assignment of virtual NXX codes. The ISP Remand Order has no bearing on this issue.

b. The Illinois Commerce Commission's Decisions in *Focal*, *Level 3* and *TDS Metrocom* Do Not Bar the Imposition of Carrier Access Charges

This Commission's decisions in *Focal*, *Level 3* and *TDS Metrocom* do not bar the imposition of carrier access charges. Despite Essex Telcom's arguments to the contrary, these Commission decisions deal only with the question of whether reciprocal compensation applies to "FX-type" traffic where the calling party and called party are physically located in two different local calling areas. In each instance, the Commission determined that reciprocal compensation did not apply because the traffic was not local. *See Focal Communications Corporation of Illinois Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company, d/b/a Ameritech Illinois*, Docket 00-0027, Arbitration Award (May 8, 2000), pp. 15-18; *Level 3*

Communications, Inc. Petition for Arbitration Pursuant to Section 252(b) of the Telecommunications Act of 1996 to Establish an Interconnection Agreement with Illinois Bell Telephone Company d/b/a Ameritech Illinois, Docket 000-332 Arbitration Award (August 30, 2000), pp. 6-10, 29-31; *TDS Metrocom, Inc. Petition for Arbitration of Interconnection Rates, Terms and Conditions and Related Arrangements with Illinois Bell Telephone Company d/b/a Ameritech Illinois Pursuant To Section 252(b) of the Telecommunications Act of 1996*, Docket 01-0338, Arbitration Award (August 8, 2001), pp. 45-48.

Asserting that bill and keep should be applied because reciprocal compensation does not would be meaningless since it would simply substitute one form of reciprocal compensation for another. *See* 252(d)(2)(B). Where traffic is non-local and not otherwise covered by the terms of the Interconnection Agreement, the Commission is free to apply carrier access. Stated under the analysis of the ISP Remand Order, where traffic falls under Section 251(g), 251(b) reciprocal compensation is not applicable; however, the Commission can still apply carrier access to intrastate interexchange traffic.

c. **<u>Virtual NXX Service Is Least Similar to FX Service</u>**

Aside from promoting its view of the ISP Remand Order, Essex Telcom repeats its assertion that Virtual NXX codes should be treated like FX traffic. Whether or not it is appropriate for the Commission to decide this issue on a comparison basis, the record simply does not support the comparison of Virtual NXX codes to an FX-to-end-user service.

First, contrary to Essex Telcom's bold assertion (Initial Brief at 10) regarding its cross examination of Mr. Skrivan's chart comparing the attributes of various services used to serve customers in different exchanges, the chart reflected two errors, neither of which was material to its conclusions and both of which were corrected in the version attached to Gallatin's Initial

Brief. The conclusion of the chart remains sound, *i.e.*, that Virtual NXX service has far more in common with 8XX service and other services applying carrier access than it does with FX service to end-users. If comparison to established service types is the appropriate measure, carrier access applies.

Next, as Mr. Skrivan's chart recognized (and Essex Telcom did not challenge), there are two types of FX service, one to end users and one to interexchange carriers. FX to interexchange carriers includes switched carrier access. *See* Attachment to Gallatin's Initial Brief. Therefore, even to the extent Virtual NXX is similar to FX to interexchange carriers, carrier access would apply. Only the FX-to-end-user service does not provide for switched carrier access. Rather, FX-to-end-user service is normally supported by a dedicated access arrangement. However, if Essex Telcom has its way, Virtual NXX service will stand alone as the only example of an interexchange serving arrangement that has absolutely *no access element* -- whether switched or dedicated.[3] That is not an appropriate outcome.

Curiously, Essex Telcom also ignores the fact that FX-to-end-user service also relies on a line-side connection. Virtual NXX codes, however, use trunk side connections, a point which Essex Telcom attempts to emphasize when arguing that Feature Group A access -- which relies on a line side connection -- is not applicable to the trunk side service that supports Virtual NXX codes. *See* Essex Telcom Initial Brief at 15. If it is inappropriate for Gallatin to bend the rules to provide a Feature Group A-like access service through a trunk-side connection, it would equally inappropriate to turn a blind eye toward the same fundamental element of an "FX-like" service by trying to shoehorn Essex Telcom's trunk-side service into a line-side slot.

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[3] Essex Telcom attempts (Initial Brief at 11) to rely on Illinois regulations to analogize its Virtual NXX service to FX-to-end-user service. While it relies on the possible implication that the regulations allows a carrier to use its facilities to provide service outside of its own certificated exchange, Essex Telcom ignores the fact that Virtual NXX uses *no* facilities out-of-exchange.

Essex Telcom also argues that the Illinois certification process supports its position. However, it mischaracterizes that process. Contrary to its assertion that incumbent LECs "have" separate interexchange authority (Initial Brief at 11-12), the transcript testimony that Essex Telcom cites supports only the fact that LECs can obtain interexchange authority. In fact, the Illinois Public Utility Act requires LECs to apply separately for interexchange authority under Section 13-403, an authority which Essex Telcom notably did not request or obtain. *See* Gallatin Initial Brief at 13 n.2. The testimony cited by Essex Telcom also explains that interexchange carriers can apply for and obtain local exchange authority if their purpose is to obtain Virtual NXX codes to avoid carrier access charges. The impact of this record evidence is that any attempt to identify traffic as local or interexchange based solely on the characterization of the carriers involved will be futile.

In trying to establish that its novel use of Virtual NXX codes should be forced onto Gallatin through the Interconnection Agreement, Essex Telcom attempts to leverage the fact that Gallatin has no current access offering that exactly matches the access it is providing to Essex Telcom in support of Essex Telcom's Virtual NXX service. Essex Telcom Initial Brief at 14-15. As Gallatin explained in its Initial Brief (at 23-24), the absence of an applicable access tariff is not a basis to force this service into the Interconnection Agreement. Rather, it is either a reasonable basis for Gallatin to stop supporting the service (if the Commission holds, for example, that Virtual NXX are an inappropriate use of numbering resources) or a basis for the Commission to order that Gallatin develop an appropriate tariffed access service to support Virtual NXX service if the Commission so holds.

Finally, while the Administrative Law Judge correctly observed that Essex Telcom's testimony on this point had no bearing on any issue in dispute (Tr. at 219), Gallatin must respond briefly to the accusations in Essex Telcom's Initial Brief (at 6-7) that Gallatin delayed interconnection. By Essex Telcom's own admission, its switch was not installed until January of 2001 and it achieved interconnection with Gallatin at roughly the same time that it achieved interconnection with Ameritech and Verizon. Tr. at 41-44. Nor was Gallatin's assertion as to how it intended to bill Virtual NXX calls in any way a denial of service, since the Interconnection Agreement provides a means for disputing invoices. See Attachment 1 to Gallatin Ex. 1 at Sections 21.2 - 21.4. Nevertheless, Gallatin cooperated in reaching an extraordinary agreement to allow Essex Telcom to pursue what Gallatin understood to be a good faith Complaint[4] before Gallatin would treat non-payment of the tariffed amount as a default. Any claim that Gallatin has held up Essex Telcom's business plans is baseless.

d. Gallatin Is Not Discriminating By Treating ISP <u>Customers Differently From CLEC Competitors</u>

Essex Telcom characterizes the issue as whether Gallatin is treating its own affiliated ISP differently from the way it is treating Essex Telcom. *E.g.*, Essex Telcom Initial Brief at 5. This apples and oranges characterization demonstrates Essex Telcom's unwillingness or inability to distinguish between Essex *Telcom*, the CLEC and Essex *Internet*, the ISP. An ISP provider like Essex Internet, under FCC rules, is considered an Enhanced Service Provider ("ESP"). Gallatin Ex. 3 at 18. As an ESP, an ISP has the option to purchase the equivalent of interexchange access from a local exchange carrier out of the local exchange carrier's local exchange tariff. *See Inter-Carrier Compensation for ISP-Bound Traffic* at ¶ 5. This is a specific exemption granted by the FCC to ESPs. Therefore, if Gallatin's ISP affiliate or Essex Telcom's ISP affiliate chooses to order local exchange service to provide dial-up ISP connections, Gallatin will provide these.

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[4] In Gallatin's estimation, the good faith nature of Essex Telcom's Complaint is drawn into question by its reliance on a theory which, under the ISP Remand Order, would preempt this Commission's jurisdiction to decide this Complaint at all.

In fact, that is similar to how Gallatin was providing dial-up service to Essex Internet prior to Essex Internet's change over to Essex Telcom's Virtual NXX service. Gallatin Ex. 3 at 18.

However, the current billing dispute relates to a situation where Essex *Telcom*, not Gallatin, is providing the dialtone service to Essex Internet. Gallatin has no comment and no interest on the terms of this arrangement between Essex Telcom and Essex Internet. But when Essex Telcom orders service from Gallatin, which is used to place interexchange calls from one local calling area to another local calling area, then this is service provided by Gallatin to an interexchange provider, not to an ESP.

TA96 and the FCC rules distinguish between the treatment of carriers and end users, particularly where those end users are ISPs subject to special FCC rules. Gallatin will provide exactly the same service at the same rate to Essex *Internet* as Gallatin provides to its affiliated ISP and any other ISP that buys service from Gallatin. By the same token, Gallatin will treat all carriers -- whether they provide local exchange or interexchange -- in a non-discriminatory manner consistent with the service they are providing. Thus, as the FCC rules provide, what Gallatin charges to an Essex entity depends on which Essex entity is involved. This will continue so long as end-user ESPs enjoy a special exemption from carrier access that is not available to carriers.

II. GALLATIN IS ENTITLED TO COMPENSATION FOR CARRYING LOCAL CALLS OUTSIDE OF THE LOCAL CALLING AREA FOR THE PURPOSE OF REACHING AN INTERCONNECTION POINT DETERMINED BY ESSEX TELCOM

Essex Telcom attempts to avoid the cost it is imposing on Gallatin through the placement of its single Interconnection Point ("IP") by (a) equating the most efficient means of establishing interconnection with "cost-free" interconnection and (b) by mischaracterizing Gallatin's position on the applicable transport and switching costs. Essex Telcom's arguments are not supported by FCC rules, the Interconnection Agreement or the record.

Moreover, as explained in Gallatin's Initial Brief (at 27-29), this issue is not ripe for decision. Given the speculative question of whether Essex Telcom will ever have customers physically located in any of Gallatin's exchanges, this issue may never be ripe. Even if it may at some future date be a claim of immediate importance, the FCC has slated this issue for ruling in its *Inter-Carrier Compensation* docket, which is therefore likely to preempt any ruling this Commission makes before this Commission's Order would ever become a factor under the Interconnection Agreement. Nonetheless, if the Commission wishes to resolve the issue, it should resolve it based on an accurate understanding of the record and the parties' positions.

a. Whether Or Not A Single IP Is the Most Efficient <u>IP Has No Bearing on Whether it Should be Free</u>

Essex Telcom focuses its argument on whether a single IP is more efficient than establishing a second IP in Gallatin's Savannah/Mt. Carroll/Thomson local calling area. Essex Telcom Initial Brief at 18. Whether or not that argument is true, it misses the issue. Gallatin has never denied that establishing a single IP may be the most efficient way to interconnect Gallatin's and Essex Telcom's local networks and has never asserted that Essex Telcom has any obligation to establish additional IPs within Illinois LATA 2. But if Essex Telcom decides to establish a single IP for any reason, that does not justify imposing the costs of that choice on Gallatin or any other LEC. Gallatin is still not obligated to provide out-of-exchange transport to complete local calls through a remote IP. Essex Telcom should be required to recognize that cost. If paying Gallatin the transport and additional switching rate from the Interconnection Agreement is the cheapest and most efficient way to provision its calling to those local exchanges, Gallatin would be surprised if Essex Telcom went to the effort to establish its own facilities and has no objection to providing the transport. But it should still be entitled to recover its cost of providing transport outside of the exchange.

b. The Transport Cost Is Subject To The Interconnection Agreement, Not Carrier Access

In its Initial Brief, Essex Telcom repeatedly asserts that Gallatin is attempting to collect carrier access charges for Remote IP calls. Essex Telcom Initial Brief at 4, 18. That assertion is flatly contrary to Gallatin's position and to the record. Gallatin made it abundantly clear in response to Essex Telcom's data requests and in cross examination that the relevant switching and transport rates are those in the Interconnection Agreement, not in the access tariffs. Gallatin does not dispute that the call is local and subject to reciprocal compensation. It disputes only Essex Telcom's asserted ability to push its network costs onto Gallatin without compensation.

CONCLUSION

Through its novel interpretation of the FCC's ISP Remand Order, Essex Telcom is now trying to exempt not just Virtual NXX calling, but all ISP-bound traffic from carrier access charges. If it cannot get the Commission to adopt that far reaching conclusion, it attempts to force all other Virtual NXX traffic in under the rubric of FX-to-end-user service, minus any access arrangement, either dedicated or switched. Solely to support this manipulation of the appropriate carrier access regime, Essex Telcom continues to monopolize 40 NXX codes to provide a service that could be provided far more efficiently through existing 8XX services or other services that appropriately compensate Gallatin and other carriers. This Commission should reject Essex Telcom's reading of the ISP Remand Order, and this use of Virtual NXX codes or, at the very least, ensure that the Virtual NXX codes cannot be used to avoid appropriate intercarrier compensation.

Through its Remote IP, Essex Telcom is attempting to push onto Gallatin the cost of network infrastructure to serve customers in various local calling areas. This Commission should reject this forced redistribution of costs and require Essex Telcom to bear its own costs either through the payment of additional switching and transport costs to Gallatin or, if Essex Telcom so chooses, through the establishment of IPs in each local calling area that it serves.

Dated this 17th day of January, 2002

Respectfully submitted,

GALLATIN RIVER COMMUNICATIONS

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CERTIFICATE OF SERVICE
Docket No. 01-0427

I hereby certify that a true and correct copy of the foregoing Reply Brief of Gallatin River Communications LLC has been served on the following by electronic mail and by first class U.S. Mail, postage prepaid, this 17th day of January, 2002.

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